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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 821

RICHARD F. SAVELLI,
Petitioner,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the District Court of Appeal, First Appellate District, State of California

Brief for Respondent in Opposition

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OPINIONS BELOW

The opinion of the District Court of Appeal, State of California (First Appellate District, Division One) is reported in 229 A.C.A. 169, 40 Cal. Rptr. 171 (1964).

JURISDICTION

Petitioner attempts to invoke the jurisdiction of the Court by a general reference to 28 U.S.C. section 1257 (Pet. Cert. - 3), but he does not identify which of the specific bases of jurisdiction, as set forth in the various sub-sections, is re-

lied upon.[1] Section 1257(3) could be considered appropriate inasmuch as it grants jurisdiction where "any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States."

However, the Petition shows on its face that it is not timely and that this Court is without jurisdiction to review the decision below. The Petition correctly states (Pet. Cert. -3) that the Supreme Court of the State of California denied a Petition for Hearing on October 7, 1964. After such a denial, the decision is final. The 90-day period allowed for filing a Petition for a Writ of Certiorari (28 U.S.C. § 2101(c) and Rule 22) expired on January 5, 1965 and the instant petition was not filed with the Clerk of this Court until January 9, 1965. Respondent is informed that no application under Rules 22(4) and 34 for an extension of time within which to file for certiorari was filed and, therefore, this Court is without jurisdiction to review the decision below.

QUESTIONS PRESENTED

Neither of the questions presented by Petitioner need be reviewed by this Court because the decision below rests upon perfectly adequate and independent state grounds.

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1. The Petition for Certiorari was prepared in complete disregard of Rules 19 and 23 of this Court. Among the more egregious departures from the established procedure on certiorari is the complete failure to demonstrate "the stage in the proceedings . . . and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them . . .; and the way in which they were passed upon by the court . . . ." Rule 23(1), subparagraph (f). The petitioner does assert that he "reserved all issues and questions related to his constitutional rights and privileges . . ." (Pet. Cert. -3) and makes a reference to the transcript where these matters may be found. However, he leaves it to the Court or respondent to determine whether they are the same contentions now raised and whether the assertions are sufficient to confer jurisdiction upon this Court. In addition, the admonition of Rule 19 that "special and important reasons" must be shown for the granting of this dis-

STATUTES INVOLVED

The principal statutes concerned herein are adequately set forth in the opinion of the District Court of Appeal and the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE AND ARGUMENT

Petitioner, a drugless practitioner, complains that he was denied a request to take an examination for the certificate of physician and surgeon. As pointed out by the District Court of Appeal, in order to take this examination, "it was appellant's burden to prove that he took the required courses at a school approved by the board." (Op. - xiii)[2] After a review of the evidence, the court held:

> "Accordingly, appellant failed to sustain the burden resting upon him to prove compliance wtih the requirements fixed by statute as a condition precedent to the taking of the subject examination." (Op. - xix.)

Certainly, it is purely a matter of state law and presents no reviewable federal question for a California court to rule that petitioner did not sustain his burden of proof. Here it is clear that he did not demonstrate that he had complied with the statutory requirements for taking a physician and surgeon's examination. No claim is made that the requirements themselves offend the Constitution of the United States.

In addition, the reviewing court took judicial notice of sections 1366 through 1367.10 of Title 16, California Administrative Code, which sets forth the list of schools approved by the Board of Medical Examiners. The court noted that

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cretionary writ has been ignored. An examination of the Petition and opinion shows, however, neither special, important nor constituitional reasons appear in this case to warrant review.

2. References to the opinion below follow the pagination in the appendix of the petition.

the school petitioner attended, Western College of Medicine, is not listed as an approved school. (Op. - xiv, text and n. 14.) Therefore, wholly apart from petitioner's failure of proof, the appellate court satisfied itself that the school which petitioner attended was *not* a school approved by the Board.

However, the District Court of Appeal did not rest with pointing out petitioner's utter failure of proof and its own affirmative demonstration that petitioner's school was unapproved. In a further effort to show that justice was done, the appellate court pointed out that the record makes abundantly clear *why* the school in question was not approved. It is from this discussion that petitioner attempts to torture a constitutional question.

At the administrative hearing, the Board of Medical Examiners did not rest its case, as it well could have, upon petitioner's failure of proof. Rather, the board affirmatively proved that Western College of Medicine, the school in question, had filed an application for approval, that a hearing had been held, and that said application was disapproved. The Findings of Fact, upon which the disapproval of the school was based, were introduced by respondent as an exhibit at the administrative hearing on this petitioner's application. The District Court of Appeal set forth these Findings in its opinion (Op. - xviii, n. 17). These Findings demonstrate that the quality of the resident courses, the adequacy of the clinic, the laboratory and equipment, and the caliber of instruction were all grossly sub-standard. Although conceding these exhibits went into evidence without objection, the petitioner complains that the board used them to make a Finding based on hearsay, in violation of California Government Code section 11513. (Pet. Cert. - 6-7.) However, even if this be error, the definition and use of hearsay is purely a matter of state law.

Moreover, the court correctly states that under California law hearsay evidence, to which no objection is made, may be considered in support of a finding. (See Op. xx and cases cited there.)

An elementary and fundamental principle of this Court's jurisdiction is that it will not review a state court decision unless a federal question was actually raised and decided and was necessary to the judgment of the court below. *Crowell v. Randell*, 10 Pet. 367, 397. This principle and its natural corollary that this Court is without jurisdiction where the judgment can in fact be sustained upon an adequate and independent state ground received what still must be its definitive exposition in *Murdock v. Memphis*, 20 Wall. 590, 635-636. These basic rules have been followed and elaborated upon repeatedly in cases such as *Moore v. Miss.*, 21 Wall. 636, 639; *Fox v. Mueller*, 296 U.S. 207, 210-211; *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U.S. 206, 212; *Minn. v. National Tea Co.*, 309 U.S. 551, 556-557; *Williams v. Kaiser*, 323 U.S. 471, 477; *Herb v. Pitcairn*, 324 U.S. 117, 126; *Black v. Cutter Labs.*, 351 U.S. 292, 298-299; and, as recently as *Nick Jankovich v. Indiana Toll Rd. Comm'n*, 33 L.W. 4123 (Jan. 18, 1965). These principles and decisions are controlling here. In the absence of an attack on the constitutionality of requiring a prospective physician to take courses at a school approved by the Board of Medical Examiners (a patently reasonable requirement), the decision below is easily supported on any one of the following principles of state law:

(1) Petitioner failed in his burden of proof.

(2) By judicially noticing the absence of his school from the approved list, the appellate court determined petitioner could not possibly meet his burden of proof.

(3) The appellate court merely applied a rule of evidence allowing an administrative agency to make a finding of fact on unchallenged hearsay.

Within none of these questions lurk even the slightest trace of a federal constitutional question.

CONCLUSION

The petitioner for certiorari should be denied as not timely filed, as presenting no federal question, and for its flagrant disregard of the Rules of the Supreme Court.

Dated, San Francisco, California
February 4, 1965.

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